No. 88-1640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,

Petitioners,

v.

DICK THORNBURGH, UNITED STATES ATTORNEY GENERAL, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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The fundamental inconsistency in respondents' briefs is that, while claiming that petitioners are relitigating facts found by the Attorney General, they have relied principally on record evidence to reach conclusions that the Attorney General never adopted. Indeed, many of their factual arguments were rejected by the Administrative Law Judge ("ALJ"), all of whose findings the Attorney General explicitly "accepted as accurate." Pet. App. 147a. Thus, it is respondents who are attempting "to retry factual issues, which have now been

settled by the Attorney General." *See* Detroit Free Press ("Free Press") Br. 49.[1]

In this reply, we demonstrate that respondents' factual arguments do not provide a basis for avoiding the two questions on which this Court granted certiorari. Section 1 shows that respondents' argument that junior papers in other cities have inevitably failed is both factually inaccurate and has no applicability to Detroit, and section 2 demonstrates that respondents' argument that the financial condition of the Free Press has been seriously weakened, in contrast to that of The Detroit News ("News"), is completely refuted by the findings of the ALJ and the Attorney General.

In section 3, we demonstrate that the Free Press did not satisfy the "probable danger of financial failure" standard in the Newspaper Preservation Act ("NPA") because respondents failed to establish that the News will retain its unprofitably low prices if the joint operating agreement ("JOA") is denied, and that approval of the Detroit JOA would undermine Congress's central goal of preserving commercial competition in markets that can sustain more than one independent newspaper. Finally, in section 4, we demonstrate that the court of appeals' application of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), to override the rule that exemptions from the antitrust laws must be narrowly construed also constitutes reversible error.

1. The Experience of Newspapers That Have Failed in Other Cities Has No Applicability to Detroit.

To support their claim that the Detroit Free Press is in "probable danger of financial failure," respondents argue at length that absent a JOA the Free Press will close because in every market,

[1]The briefs of the Free Press and the Attorney General contain numerous citations to testimony and exhibits that were neither relied on nor adopted by the Attorney General. Since Attorney General Meese, whose decision this Court is reviewing, cited only the ALJ's Recommended Decision and not any other evidence in the record, we have relied on his decision and that of the ALJ, but not on testimony or exhibits submitted during the administrative hearing.

including Detroit, the junior newspaper has failed or inevitably will fail. Free Press Br. 3-6, 36, 45 n.10; News Br. 3-19, 30; Attorney General ("AG") Br. 3, 5-6, 36. That argument cannot sustain the JOA here because it is inconsistent with the rulings of the Attorney General, the ALJ, and the basic premise of the NPA.

Attorney General Meese, in the decision respondents purport to defend, seriously undercuts respondents' inevitability argument by concluding that "it is the case, as the Administrative Law Judge found, that the Detroit market *could* sustain two profitable newspapers *if* both circulation and advertising prices were increased." Pet. App. 143a (emphasis in original; citations omitted). ALJ Needelman directly addressed the argument that junior papers inevitably fail and rejected it, finding the "notion that the junior paper faces inevitable extinction [to be] ambiguous at best since the designations 'dominant' and 'junior' are not etched in stone." Pet. App. 109a n.259. According to Judge Needelman,

> [t]his is best seen in Philadelphia where the Knight-Ridder papers overcame a substantial daily circulation lead (and six years of losses) to triumph over the rival *Bulletin*. [I]n San Francisco the roles of 'junior' and 'dominant' were reversed despite scale economies. There is also some evidence that in recent years junior papers have been able to prosper in large metropolitan areas. Besides, the very notion of the inevitable demise of a junior paper loses some of its force as applied to Detroit where the 'junior' and 'senior' papers have been fighting it out for almost 27 years and during most of that time both were profitable.

Id. In fact, junior newspapers in Washington (*Washington Post*), Anchorage (*Anchorage News*), and Chattanooga (*Chattanooga News-Free Press*) have become senior. Morton, *Dueling Dailies: A Short History*, 10 Washington Journalism Review 48 (Nov. 1988).

Moreover, Detroit is the nation's fifth largest newspaper market. Even if the Free Press were a "junior" paper, which it is not (*see* pp. 4-9, *infra*), the experience in other, smaller cities, of newspapers

with smaller circulation and advertising revenue, is not applicable. As Judge Needelman pointed out, "[o]nly one larger metropolitan area (Philadelphia) does not now have two competing newspapers, and several markets smaller than Detroit support newspaper competition." Pet. App. 87a.

Finally, respondents' argument proves too much. If Congress had believed that the second newspaper in a competitive market must inevitably fail, then the requirement that the Attorney General examine the financial status of the applicants and determine that one of them is in "probable danger of financial failure" would have been superfluous. Instead, Congress would have drafted a statute that conferred the exemption on any two newspapers in a competitive market, that sought a JOA. Thus, respondents' construction of the NPA would nullify the basic statutory standard that Congress so carefully drafted (Pet. Opening Br. 16-20), as well as the requirement that the Attorney General find that granting a JOA is consistent with the purposes of the NPA. 15 U.S.C.§§ 1801, 1803(b).

For all these reasons, the Attorney General's decision cannot be sustained on the basis of the argument most strenuously pressed by respondents — that the experience of newspapers in other cities demonstrates that the Free Press cannot survive.

2. The Free Press and the News Are Competitive Equals.

Respondents portray the Free Press as a financial "shell" about to succumb to the News, which they argue is dominant in all important categories. *See, e.g.*, Free Press Br. 1, 29. This picture is not supported by the record below, nor by the findings of the ALJ and the Attorney General.

First, respondents either ignore or bury the finding that the News has also suffered deep losses, "almost as severe as the Free Press's." ALJ Recommended Decision at Pet. App. 121a. This fact alone distinguishes Detroit from every JOA application that the Attorney General had previously approved. Historically, a dominant newspaper sought a JOA with a junior paper that was in a downward spiral and that had been losing money for many years. AG Decision and Order at Pet. App. 141a; *see also id.* at 146a (Congress's "frame of reference essentially embraced the scenario of a strong newspaper poised to drive from the market a weaker competitor experiencing the 'downward spiral' phenomenon due to external market forces").

Second, the Free Press was dominant in the critical morning market. Indeed, this factor had prompted John Morton, the expert retained by the *applicants* for the hearing, to conclude that the Free Press was more likely to prevail than the News. As Judge Needelman recounted, Morton had predicted in an article, published only two months before the newspapers applied for a JOA, that:

> if the Detroit newspaper war was to continue the News was 'at greater risk' than the Free Press. Morton saw a ten-year trend favoring the Free Press and he emphasized that because of its strong morning franchise it was positioned to avoid the downward spiral and overtake the News.

ALJ Recommended Decision at Pet. App. 112a, *quoting* Morton article (citations omitted). "Even after the JOA was announced in April 1986," according to Morton, "'the Free Press [was.] doing better than the News.'" *Id.* Morton believed that "'if everything remained equal and the Free Press remained the morning newspaper and the News remained the afternoon newspaper, basically in the long run that would catch up with the News.'" *Id.*

Third, the ALJ found that the Free Press and the News were competitive equals at the time they filed their JOA application. They had battled for more than 25 years, both making a profit until 1979, "without either moving toward a position of market dominance." AG Decision and Order at Pet. App. 140a. By April 1986, they had fought "to a virtual draw." ALJ Recommended Decision at Pet. App. 31a; *see also id.* at 31a-85a. "At the highest levels of Knight-Ridder management, the view was held that '[t]he newspapers have fought to a standstill.'" *Id.* at 31a n.93 (citations omitted).

Moreover, by every important measure, the Free Press either had held its ground or was gaining on the News. Between 1960

and 1976, it continuously gained ground in circulation, and "b[y] 1976, the daily circulation battle ha[d] been fought to a virtual tie." *Id.* at 40a-41a. Although the News initiated a morning edition in 1976, in 1986 the Free Press still "maintain[ed] its huge leadership in the critically important field." *Id.* at 55a (footnote and internal quotations omitted). After 1976, "the Free Press's share of total daily circulation [morning and afternoon] never fell below 49%." *Id.* at 40a-41a. By the time they negotiated the JOA, the Free Press's circulation revenues exceeded the News's, as did its overall readership. *Id.* at 55a, 58a. Indeed "on or about the date of the announcement of the JOA, the Free Press had all but eliminated the News's daily circulation lead," which the News "had only been able to hold by discounting its already low cover prices." *Id.* at 42a, 120a.

Although the News had maintained its lead in advertising, here too the "Free Press ha[d] improved [its] share of the field over time." *Id.* at 33a, 36a. By April 1986, when the newspapers applied for a JOA, "the News's advertising lead, which the News had only been able to hold by severe discounting, was vulnerable to a change in the circulation lead." *Id.* at 120a.

The newspapers' equal division of the JOA profits is also compelling evidence that they perceived themselves to be competitive equals. The Free Press argues that it surrendered control for a larger share of the profits than it could otherwise have obtained, but Judge Needelman, and therefore the Attorney General, rejected that argument. As the ALJ explained, "on major issues of governance . . . Gannett has no effective control since nothing can be done without Knight-Ridder approval." *Id.* at 114a. He further found that "the profit split was not based on the question of control but instead reflected the crucial importance of the morning franchise." *Id.*

Fourth, the respondents have presented a totally one-sided picture concerning the strengths and weaknesses of the two newspapers. While they are correct that the News was ahead in some important categories, they ignore other areas of the Free Press's strength that were identified by the ALJ. In addition to its clear

dominance in the morning market, the Free Press had made dramatic gains in the city zone, retail trade zone, and the primary market area, which are the "key areas" that "retail and classified advertisers are most interested in." *Id.* at 44a.[2] In the Sunday edition, it also outgained the News by almost three to one in all three areas. *Id.* at 34a, 48a-49a.

In response, the Free Press argues that it would have entered a downward spiral, losing ground in circulation and advertising, without a subsidy from its parent, Knight-Ridder. Free Press Br. 9-12. However, as Chief Judge Wald noted, "[t]he ALJ found that the Detroit situation was not one of a 'junior' newspaper valiantly trying to retain a foothold in the market, and that the characteristic elements pushing one paper into a 'downward spiral' did not exist." Pet. App. 206a n.1 (citations to majority opinion omitted). "Nor," according to the Attorney General, did "there exist marketplace declines in overall advertising and newspaper circulation in Detroit of the sort that traditionally propel a junior newspaper into the proverbial 'downward spiral' that is fatal to survival." Pet. App. 207a n.2.[3]

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[2]During the five years prior to negotiating for a JOA, the Free Press had added 38,870 to its daily circulation in the city zone and retail trade circulation zones, while the News had made no gains in those locations. *Id.* at 33a-34a. During a similar period of time, the Free Press's share in the primary market area grew 36,000 while the News *lost* 22,000. *Id.* at 45a.

[3]In 1983, the Free Press "projected from an economic model that under conditions of 'normalized competition,' the Free Press would earn $1.5 million per year and the News $5 million." ALJ Recommended Decision at Pet. App. 97a. In addition, the Free Press had had opportunities to abandon its drive for dominance and to return to profitability. However, "[o]nce the struggle intensified, the Free Press seemed impervious to any attempts by the News either 'to coach' it into returning to card rates by intermittent lulls in the severity of discounts or to change its 'style of competition' by a demonstration of the high cost of discounting." *Id.* at 19a n.37 (citations omitted). It is relevant that Gannett's "pricing strategy was also motivated by the realization that any increase in circulation price might jeopardize the JOA by putting the Free Press into the black." *Id.* at 91a. Finally, the Free Press's daily circulation prices are

(footnote continued)

The Free Press also relies on the requirement in the NPA that its financial performance be evaluated on a stand-alone basis, 15 U.S.C. § 1802(5). Br. 35. But as Judge Needelman found, this provision "cannot be transformed into a requirement that one must be oblivious to the obvious point that the Free Press's financial condition was traceable to the parent's strategy of striving for future market dominance and profitability (or a JOA) at the expense of present profits." Pet. App. 128a. For example, in 1985, Knight-Ridder approved $22.3 million for expansion of the Free Press's Riverfront Plant, based on "projections [that] did not foresee operating profits until at least 1990 and under some scenarios even later." ALJ Recommended Decision at Pet. App. 25a. Nevertheless, "[b]ecause the Riverfront Plant expansion was not completed until December 1986, the added capacity deemed so essential for the confrontation with the News was not even available to the Free Press until six months after the JOA application was filed." *Id.* at 27a (footnote omitted). Since Knight-Ridder's deep pocket was an essential component of the corporate strategy that led to the losses in the first place, the claim that the Free Press could not continue to sustain those losses without Knight-Ridder's assistance is not a basis for awarding it an antitrust exemption.

Finally, the Free Press claims that its financial condition "has substantially worsened in the last three years" (Br. 46 n.11), and the *amici curiae* supporting its position repeatedly state that Knight-Ridder's Board of Directors has threatened to close the Free Press unless the JOA is granted. However, the Attorney General correctly held that, since "these maneuvers occurred after close of the record," they may not be considered in evaluating the JOA application. J.A. 150 n.4. In any event, the deterioration of the Free Press after the papers applied for a JOA would be expected since the designation of a newspaper as "failing" may have "an adverse effect on [employee] morale and performance" of a newspaper. ALJ

5 cents above the News's, and it offers a smaller advertising discount than the News. AG Decision and Order at Pet. App. 141a-43a. Thus, there is no basis for respondents' argument that the Free Press's losses were caused by price reductions that were necessary for it to retain its market position.

Recommended Decision at Pet. App. 42a. Thus, as the Antitrust Division recently held in evaluating another application, such a decline may not be considered in determining whether the newspaper qualifies for a JOA.[4]

In any event, the Free Press's claim of recent deterioration is open to serious question in light of the full-page self-promotions that it has recently published. *See* Brief of *Amicus Curiae* of Little Rock Newspapers, Inc., Appendix A. Entitled "Drawing Power," the ad states that "[t]he Free Press is the newspaper gaining momentum in metro Detroit" and has "outgained the News in the metro area — two-to-one daily and by an even greater margin on Sunday during the past six months." This achievement is extraordinary in light of the contrary experience of other papers designated as failing for purposes of the NPA, and it demonstrates the strength of the Free Press. For all these reasons, the record plainly demonstrates that, at the time they applied for a JOA, the Free Press and the News were competitive equals.

3. The Applicants Have Not Demonstrated That the Free Press Is in Probable Danger of Financial Failure or That Approval of the JOA Is Consistent With the Purposes of the Act.

A. In approving the JOA, the Attorney General relied heavily on the ALJ's finding that the Free Press could not unilaterally return to profitability. Pet. App. 141a, 142a. According to both fact-finders, the Free Press could not increase its circulation or advertising prices without a loss in market share unless the News also raised its prices. Therefore, the News could prevent the Free Press from becoming profitable. But the News was also in this predicament, since it too would continue to lose large sums of money until both newspapers raised their prices. Pet. App. 122a, 140a-44a.

[4]Report of the Assistant Attorney General, Public File No. 4403-13, pp. 18-19 (1989) (application of York, Pa. newspapers) ("Because Congress did not intend to allow JOAs that could reasonably have been avoided, the Antitrust Division's analysis gives no weight to any adverse effect that may ensue from the JOA filing itself.").

Nevertheless, Attorney General Meese accepted the applicants' argument that the News would not raise its prices, even though such a course would insure that it would continue to suffer deep losses. Pet. App. 143a. To support this finding, he relied *solely* on the self-interested statements of Gannett officials, although he did not cite their testimony or any other evidence that the applicants had introduced. Instead, the Attorney General only cited the ALJ's explanation of why this testimony could ***not*** be believed, namely that Gannett's witnesses "never explained how Gannett can persist in this strategy in the face of uncontroverted proof that neither the News nor the Free Press can become profitable so long as both papers continue current competitive strategies." *Id.*; ALJ Recommended Decision at Pet. App. 92a. Indeed, Attorney General Meese did not actually conclude that the News *would* maintain its below-cost pricing; he simply stated that such a course would not "reflect unsound business judgment." *Id.* at 143a.

The Attorney General's decision is further undercut by its inconsistency with other, contrary findings made by the ALJ, which the Attorney General implicitly accepted, but to which he never responded. Judge Needelman had found that the 50/50 profit split "represents a perception by Gannett that there can be neither [a] clear winner nor a clear loser for at least seven years" if competition were to continue. *Id.* at 122a. Viewed in this time frame, as Chief Judge Wald pointed out below, Attorney General Meese's prediction "makes no economic sense" because it assumed that the News would continue to lose money for an essentially indefinite period of time. Pet. App. 205a. While the current Attorney General argues in his brief that it was "rational" for the News to refuse to raise prices in the absence of a JOA (Br. 32), his argument assumes that the News would not follow the Free Press's lead, even though such a price rise would also be essential to the News becoming profitable. Nor does he reconcile the testimony of Gannett officials that they would continue to lose money, in order to force the Free Press to close, with the Justice Department's view that predatory pricing schemes are inherently unlikely to succeed. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 121 &

n.17 (1986); *see also* Pet. App. 208a n.4. Finally, the applicants have not cited any evidence in the administrative record or elsewhere that demonstrates that a dominant newspaper has succeeded in eliminating its competitor with a below-cost pricing strategy.[5]

Thus, as a matter of law, a newspaper cannot demonstrate that it is in "probable danger of financial failure" on the ground that it will continue to lose money until its competitor raises prices, where the competitor also will continue to suffer deep losses as long as it continues to price below its costs, particularly where the newspapers are competitive equals. In any event, the Attorney General's central finding that the News will not raise its prices for the foreseeable future, even if the JOA is denied, cannot be sustained because it is arbitrary and capricious.

The Free Press argues that the test that petitioners have advocated would reinstate the failing company standard of *Citizen Publishing Co. v. United States*, 394 U.S. 131, 133 (1969), where this Court required that one paper be "about to go out of business" in order for the parties to a JOA to avoid liability under the antitrust laws. Free Press Br. 37. However, all of the other post-1970 JOAs that the Attorney General has approved would still be valid under petitioners' interpretation of the NPA. Thus, all of those decisions involved one newspaper in a downward spiral (Pet. App. 141a), and none involved a "failing" paper that could become profitable if prices were increased. An additional factor distinguishing those applications is the profit splits, which ranged from 80%/20% to 68%/32%, indicating that the applicants were not competitive equals. *See* ALJ Recommended Decision at Pet. App. 113a n.277. Accordingly, petitioners do not advocate that the Court should reinstate the *Citizen Publishing* standard, but instead that it hold that the NPA prohibits

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[5]On the other hand, it would be rational for the dominant paper to cut prices if a JOA were available as a fall-back in the event that the competitor was not forced to close. As described in the *Amicus Curiae* brief filed by Little Rock Newspapers, Inc. (Br. 2, 5a), just six days after Attorney General Meese's decision, but prior to the time this case was filed, Gannett slashed the price of the *Arkansas Gazette*.

the Attorney General from approving a JOA for newspapers that are competitive equals in a market where both papers could make a profit if pricing became "'rational and consistent with other markets around the country.'" ALJ Recommended Decision at Pet. App. 96a (*quoting* Free Press management).[6]

B. Respondents Attorney General and Free Press acknowledge that, even if they had demonstrated that the Free Press is in probable danger of financial failure, approval of the JOA must also effectuate "the policy and purpose" of the NPA. AG Br. 19; Free Press Br. 8. However, the Free Press argues that the NPA was not intended to preserve commercial competition, but rather "to effectuate the First Amendment goal of preserving competition in ideas." Free Press Br. 42 (internal quotation omitted). In the Free Press's view, that interest is adequately preserved by the joint operating agreement which provides that the newspapers will have separate news and editorial staffs.

Respondent's effort both to limit the Congressional intent to First Amendment considerations and to argue that a JOA will not affect newspaper content is untenable. Congress's concern about unduly limiting commercial competition is demonstrated by its decision to draft a tighter definition for future JOAs than for those already in existence in 1970, and to require review by the Attorney General. *See* Pet. Opening Br. 16-20. In any event, under the JOA, "competition in ideas" will be diminished since there will be no economic incentive to compete in news-gathering or editorial positions, and on Saturday and Sunday, when the newspapers will publish joint editions, competition will be eliminated altogether. As Chief Judge Wald explained, the "[l]egislative history [of the NPA] suggests that Congress wanted to preserve as many 'reportorially independent and competitive' newspapers as possible, 15 U.S.C.A. § 1801 (congressional declaration of policy), but, recognizing that *some* markets in which two or more newspapers presently existed could support only one daily, sought to retain as much of the disappearing paper's voice as possible." Pet. App. 209a-10a (emphasis in original). Thus, Congress did not find that newspapers that operate under a JOA are comparable to those that operate independently, but only that a JOA would be preferable to a single, monopoly publication.[7]

[6]The Free Press's argument that the antitrust laws would prohibit a collusive price increase is beside the point. These laws do not prohibit competitors from independently raising prices, as these two papers have done on several occasions, including one instance where they raised prices on the same day (ALJ Recommended Decision at Pet. App. 88a-89a). *See, e.g., Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1953).

Therefore, any interpretation of the NPA that allows newspapers in healthy markets intentionally to incur losses in order to qualify for a JOA would be contrary to the underlying purpose of the Act. Yet in approving the JOA, the Attorney General relied only on factors over which respondents had complete control: the losses that the newspapers have suffered because they have priced their product below market rates; the self-serving testimony of Gannett officials that they will not raise their prices; and Knight-Ridder's threats, repeated in the Free Press's brief and in the briefs filed by its *amici curiae*, to close the Free Press unless the JOA is granted. Pet. App. 141a-44a.

Thus, the Attorney General's opinion condones the newspapers' "boot-strap" strategy of using their own predictions about what will happen in the future to prove that the Free Press is now failing. Calkins, *Developments in Antitrust and the First Amendment: the Disaggregation of Noerr*, 57 Antitrust Law Journal, 327, 377 (1988). As Professor Calkins explains, "[l]eft unchanged, the [Attorney General's] decision is an invitation to newspapers in two-paper cities to engage in predation, comforted by the knowledge that the reward for failure may be a JOA." *Id.* at 378; *see also*

[7]Nor, as this Court held in *Citizen Publishing Co. v. United States*, *supra*, 394 U.S. at 139, do restraints imposed by joint operating agreements "have [any] support from the First Amendment." *See also Associated Press v. United States*, 326 U.S. 1, 20 (1944) ("Surely [the First Amendment] does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.").

Barnett, *Detroit's high-stakes 'failure' game*, XXVI Columbia Journalism Review 40 (Jan./Feb. 1988).

The News appears to agree with this analysis, although it claims that granting a JOA under such circumstances would be consistent with Congressional intent. Br. 33-34, 38. In contrast, the Free Press appears to agree that petitioners' scenario might be inconsistent with the purposes of the NPA, but it relies on the Attorney General's representation that he "could deny the application if the record showed that the two newspapers had deliberately created operating losses as a means of obtaining a JOA." Br. 49. As the district judge pointed out, however, this formulation of the issue is a "straw man" because the central concern of both the Antitrust Division and the ALJ was that both papers had engaged in the risky strategy of seeking dominance "secure in the belief that failure too had its reward in the form of JOA approval." Pet. App. 160a (internal quotations omitted).

The Attorney General also argues that this JOA will not serve as a precedent because the Detroit market "has its own particular characteristics that are not likely to be replicated elsewhere." Br. 38. However, his claim that the circulation rates for both newspapers are "apparently highly price sensitive" (*id.*) was not adopted by Attorney General Meese, the ALJ, or either court below, and, in any event, is not supported by the record citations that he has provided. Moreover, his argument that the newspapers cut their prices because of the 1979-84 recession is not supported by the findings of the other decision-makers in this case, who instead concluded that the low prices were caused by the papers' goal of achieving dominance or a JOA as a fallback. Pet. App. 132a-33a (ALJ: "losses incurred by the Free Press and the News are attributable to their strategies of seeking market dominance and future profitability at any cost along with the expectation that failure to achieve these goals would result in favorable consideration of a JOA application"); 146a (Attorney General Meese: "strategy followed by both papers . . . for nearly a decade [indicates that Knight-Ridder was] principally pursuing [the goal of] market domination"); 163a (District Court: "the Free Press was primarily motivated by competitive

aims"); 172a (Court of Appeals: "[o]ver the past fifteen years, the papers have been engaged in fierce competition for absolute dominance of the Detroit market"). Thus, the "peculiar circumstances" on which the Attorney General relies to distinguish this case are not a basis for affirming the decisions of either Attorney General Meese or the court of appeals.

To the contrary, it is likely that any future applicant will have a much stronger case for a JOA, and therefore, if this JOA is sustained, it will be impossible as a practical matter to reject future applications from newspapers that lost money because of low prices. Under the Attorney General's opinion, an applicant would only need to show substantial losses and that its profitability was dependent on a price rise by its competitor, which would not occur. Establishing that the competitor would not raise prices could easily be accomplished through the same kind of self-serving testimony of one of its officials, as was used here.

Thus, the Attorney General's decision is likely to encourage competing newspapers in other cities to engage in destructive price competition designed to achieve dominance or an extremely lucrative joint operating agreement. As Chief Judge Wald pointed out, this would "make it even *more* probable that newspapers will disappear than if the Act had never been passed in the first place." Pet. App. 210a. For this reason, approval of the Detroit JOA is contrary to the fundamental purpose of the Newspaper Preservation Act.

4. The Court of Appeals' Incorrect Reliance on *Chevron*, to Avoid Application of the Antitrust Rule Requiring Narrow Construction of the Act, Provides an Additional Reason for Reversing the Decision Below.

In our opening brief, we demonstrated that the court of appeals had concluded that it could not sustain the Attorney General's decision unless it granted him great deference, in light of the rule requiring narrow construction of antitrust exemptions. We also

demonstrated that the court of appeals had improperly used this Court's decision in *Chevron v. Natural Resources Defense Council*, *supra*, to excuse the Attorney General from applying the antitrust rule. Pet. Opening Br. 29-39.

In response, the Attorney General states that "on consideration, we do not believe that any *Chevron* issue is presented" in this case. AG Br. 23, 42. Although the statement suggests that this was the first time that the Attorney General had considered the applicability of *Chevron*, the record demonstrates that it represents a sharp reversal of the Justice Department's position. It is also wrong.

In their briefs in the court of appeals, both the Attorney General and the Free Press identified this Court's decision in *Chevron* as an "[a]uthorit[y] chiefly relied upon." At oral argument, Judge Silberman, who authored the majority opinion, made it clear that he viewed the question of whether *Chevron* allowed Attorney General Meese to ignore the antitrust rule as central to whether the Attorney General's decision should be upheld:

> QUESTION [Judge Silberman]: I hope, Mr. Letter, you realize there was a $64 question that Judge Ginsburg and I put to Mr. Clifford, the answer of which I think, if his answer is correct, you probably lose the case.[8]
>
> MR. LETTER [Counsel for the Attorney General]: Your Honor, I think it's a $64,000 question and —
>
> QUESTION: Maybe $64 million.
>
> MR. LETTER: . . . In answer, I believe to Judge Silberman's question, I would have said that Chevron is directly on point here, it is a Supreme court decision that tells us what does the arbitrary and capricious standard in the APA mean, and it says that when the Attorney

[8]Mr. Clifford had agreed that the Attorney General was required to apply the rule that exemptions from the antitrust laws must be narrowly construed and had declined to argue that *Chevron* had "any important impact" on the issue. Oral Argument Tr. 46-48.

> General interprets a statute in a particular way, you must pay essentially total deference to that if the statutory language is vague, you have no authority to step in and—

Oral Argument Tr. 54-55.

According to Judge Silberman's majority opinion, "[t]his is precisely the paradigm situation *Chevron* addressed." Pet. App. 181a. Judge Silberman also found that *Chevron*'s "restraining leash" required the court to uphold the Attorney General, even if the Attorney General's construction of the NPA was inconsistent with the antitrust rule. Pet. App. at 200a. As we pointed out in our opening brief, that approach to construing the NPA was inconsistent with the position that had been previously adopted by the Justice Department, and by the Ninth Circuit in *Committee for an Independent P-I v. Hearst*, 704 F.2d 467, *cert. denied*, 464 U.S. 892 (1983). Pet. Br. 29.

Respondent Attorney General also misstates the *Chevron* issue in this case: petitioners' argument is not that the Attorney General was "requir[ed] to explain that he had applied the recognized canon of statutory construction that exemptions from the antitrust laws must be narrowly construed." AG Br. 44. Instead, we contend that the court of appeals erred in holding that *Chevron required* it to defer to the Attorney General even if his construction of the Act was at odds with the rule. The decision below, allowing administrative agencies to broadly construe antitrust exemptions, could have a serious impact on numerous exemptions from the antitrust laws. *See* Pet. Opening Br. 35 & n.12. Such a change in the law would upset settled expectations of Congress, regulated industries, and the public, since these antitrust exemptions were adopted at a time when the antitrust rule requiring narrow construction was firmly embedded in our jurisprudence.

We agree with the Free Press that the issue here is ultimately one of congressional intent. But in our view, the contrast between the pre-1970 and post-1970 standards, Congress's reference to *United States v. Third National Bank*, 390 U.S. 171 (1968), the burden of proof which the Justice Department agrees the applicants

must bear, and the NPA's legislative history all demonstrate that Congress intended that the antitrust exemption would be narrowly construed. *See* Pet. Opening Br. 17-20. Since the rule had been recognized long before the enactment of the NPA in 1970, its application is necessary if congressional intent is to be the guide.

The weakness of the Free Press's argument that this rule should not be followed is demonstrated by its citation to *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980), as the sole authority for its claim that "[i]n other similar contexts, this Court has refused to construe antitrust exemptions 'narrowly' where the proffered narrow construction would defeat significant competing interests recognized by Congress." Free Press Br. 41. Contrary to the Free Press's representation, this Court did not discuss the antitrust laws in *Dawson*, much less indicate that the patent laws are an antitrust exemption.[9]

In any event, the Attorney General now concedes that, despite *Chevron*, both the courts and the Attorney General must apply the antitrust rule in interpreting the plain language of the NPA, and he appears to agree that the rule would have to be applied even if the statute were ambiguous, although he argues that "somewhat greater caution . . . would be in order." Br. 45 n.30. Therefore, the fact that the majority of the court of appeals relied on *Chevon* to avoid application of the antitrust rule provides an additional reason for reversal of the decision below.

[9]While respondent Attorney General is correct that Attorney General Meese did not explicitly reject the rule (Br. 44), or for that matter even mention it, there is no basis for his statement that "it is undisputed that the Attorney General applied the pertinent canon in construing the Newspaper Preservation Act." *Id.* at 45 n.30.

CONCLUSION

The judgment of the court of appeals should be reversed, and the Decision and Order of the Attorney General should be set aside.

Respectfully submitted,

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